UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
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JUL 06

Mr. George Clemon Freeman, Jr.
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Dear Mr. Freeman:

This letter is to respond to your appeal dated May 21, 1992 on behalf of Reserve Coal Properties Company (Reserve). EPA Region III has reviewed your appeal and understands the position Reserve has regarding the "primary activities test." After consultation with EPA Headquarters, the Region has determined that the position detailed in the January 27, 1992 letter from Mr. Bernard Turlinski, Chief, Air Enforcement Branch, to Pamela Faggert, Assistant Executive Director, Regional Operations, Virginia Department of Air Pollution control, still applies. If you wish to receive a formal applicability determination based on our decision regarding the proper applicability threshold for the proposed facility, please provide Mr. Turlinski with the specifics on the proposed Reserve project including a description and analysis of all emissions units.

Reserve proposes to construct a coal mine and coal cleaning facility (including thermal dryers) at a single site in Buchanan County, Virginia. Reserve considers coal mining to be the primary activity at the site and on this basis argues that the threshold for new source review (NSR) applicability should be 250 tons per year (TPY). In his January 27, 1992 letter, Mr. Turlinski found that the presence of a coal cleaning facility with thermal dryers placed the facility within the list of enumerated sources in Section 169(1) of the Clean Air Act and subject to a 100 TPY threshold. You are now asking Region III to reconsider and reverse this determination. I decline to do so.

It is EPA's view that the plain meaning of Section 169(1) requires the coverage of a coal cleaning facilities. As you are aware, that Section provides:

> The term "major emitting facility" mean any of the following stationary sources of air pollutants which . . . have the potential to emit . . . one hundred tons per year or more of any air pollutant from the following types of stationary sources: . . . coal cleaning plants (thermal dryers) . . . .

Thus, Congress specifically identified coal cleaning facilities as one of the types of stationary sources that would be subject to the 100 TPY threshold for the prevention of significant deterioration (PSD) applicability. As EPA has previously noted, Congress compiled the list of 28 source categories in Section 169(1) based on information that such sources contributed significantly to ambient air concentrations of air pollutants.[See footnote 1] It follows that where a listed activity can emit more that 100 TPY, its emissions should be given the careful scrutiny that the PSD program affords.

Moreover, we cannot agree that the existence of collocated facilities somehow alters the reading of this provision. Coal preparation plants, like sintering plants and fossil fuel boilers of more than 250 million British thermal units per hour heat input, two other sources listed in Section 169(1), are frequently located within larger integrated facilities. Yet Section 169(1) provides no indication that the listed categories are somehow limited to those sources that stand alone. Indeed, if EPA were to limit Section 169(1) to only those listed facilities that are not part of other operations, many boilers and other listed sources that emit or have the potential to emit in excess of 100 TPY of an air pollutant would escape review.

Finally, even if Section 169(1) is considered ambiguous on this issue, EPA's position that it will consider listed sources to be subject to PSD if the 100-ton threshold is met, regardless of the proximity of other types of operations, is a reasonable interpretation of the statutory language. It focuses the PSD program on the very sources that Congress singled out for scrutiny. It also eliminates an inequity that would exist if Reserve's views were adopted -- it treats a 100-ton listed source the same whether or not it is part of a facility that includes a source subject to the 250-ton limit.

Reserve for its part does not contend that EPA's position is precluded by the statute. Rather it asserts that EPA took a contrary position in a preamble to the 1980 PSD regulations and that EPA is somehow still bound by this preamble language since it has never repudiated this position through rulemaking. Neither position is tenable.

Reserve principally contends that EPA, in the preamble to the 1980 PSD regulations, committed itself to using a "primary activity" test to determine the proper applicability threshold for a source that includes more than one pollutant-emitting

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Footnote 1. Letter from William Hathaway, Director, Air, Toxics and Pesticides Division , EPA Region VI, to Mr. Steve Spaw, dated July 28, 1989.

activity. However, this argument confuses determining the scope of the source with determining the applicable threshold once the source is so defined.

As part of a new method for determining what activities at a site would be aggregated, EPA adopted in the 1980 regulations a new regulatory definition of "building, structure, facility, and installation" to include "all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person . . . . " 45 Fed. Reg. at 52695; see e.g., 40 CFR Section 52.21(b)(6). The regulations further provided that pollutant-emitting activities would be considered to be part of the same industrial grouping if they belong to the same two-digit SIC code. Thus, EPA stated it would group together as one "source" all pollutant-emitting activities falling under the same two-digit SIC code. 40 CFR Section 52.21(b)(6). EPA introduced the "primary activity" test as a means of discerning the scope of a source with operations falling into separate SIC codes:

> Each source is to be classified according to its primary activity, which is determined by its principal product or group of products produced or distributed, or services rendered. Thus, one classification encompasses both primary and support facilities, even when the latter includes units with a different two-digit SIC code.

45 Fed. Reg. 52676, 52695 (August 7, 1980). However, EPA's endorsement of this test to group disparate activities into one "source" does not amount to an adoption of this test to determine what applicability threshold applies to that source once it is defined.[See footnote 2]

A different issue is presented when an activity within a single source, that may not be the primary activity, is subject

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Footnote 2. Mr. Reich's letter to Mr. Daniel of May 32, 1983, which you rely on, makes this error. The letter states that the primary activity of the source is the "key" to determining the applicability threshold. However, it provides no explanation of this conclusion nor cites authority to justify it. In light of EPA's subsequent and more authoritative interpretations of this issue, we decline to follow that letter.

to the lower, 100 TPY applicability threshold and thus would constitute a major stationary source standing alone. EPA addressed this issue in the 1989 rulemaking on fugitive emissions (54 Fed. Reg. 48870 (November 28, 1989)) and specifically determined that a coal cleaning plant collocated with a surface coal mine would be subject to the 100 ton threshold.

> EPA position has been that stack emissions and fugitive emissions from a coal cleaning plant or coal preparation plant must be summed in determining whether it would be a major stationary source. If, standing alone, such a plant were "major", and therefore subject to review, then a collocated surface coal mine generally would also be considered part of the major source and subject to substantive PSD and NSR requirements regardless of whether surface coal mines are listed . (See Alabama Power, 636 F.2d at 369). Such operations typically must be aggregated as single source under EPA's rules because they belong to the same SIC two-digit code, and typically are located on adjacent or contiguous properties and are under common control.[See footnote 3]

54 Fed. Reg. 48881; see also 40 Fed. Reg. 7090, 7092 (February 28, 1986)(If the coal cleaning plant were `major' than the mine would also be brought into NSR, regardless of whether . .[fugitive emissions from surface coal mines are counted or not]").

In summary, EPA's policy is to use the primary activity test to determine which SIC code governs, and thus, which activities may be grouped into a single "source". However, once the source is so identified, EPA will determine the proper applicability threshold on the basis of the categories set out in Section 169(1). If a source includes an industrial operation listed under Section 169(1), the 100-ton threshold will apply to the listed operation no matter what the primary activity of the entire source.[See footnote 4]

Footnote 3. For the same reasons, stack emissions from the mine must be added to the emissions of the preparation or cleaning plant in determining threshold applicability.

Footnote 4. The decision whether to include fugitive emissions from collocated mines for applicability purposes is decided on a case-by-case basis, depending on the primary activity of the operation

Finally, since EPA did not embrace a primary activity test for determining thresholds in the 1980 preamble and in subsequent proceedings has indicated that coal cleaning plants over 100 tons will be subject whether collocated with a mine or not, notice and comment rulemaking on the issued is unnecessary.[See footnote 5] No further administrative action to implement this interpretation is necessary or warranted.

I note this ruling concerns coal cleaning facilities and does not affect the "commercial feasibility" of a new coal mine by "adding additional technology requirements", as you have stated in your letter. Assuming mining is the primary activity, the coal cleaning plant and only the non-fugitive emissions of a proposed mine would be considered in determining PSD applicability for the mine. With regard to PSD applicability for the coal cleaning plant -- and again assuming that mining is the primary activity at the site -- only the plants' emissions would be considered. Further, if the coal cleaning plant were to be subject to PSD review, only its emissions and not the mine's would be subject to Best Available Control Technology. However, the emissions of the mine and the coal cleaning plant, along with all other nearby sources, would need to be evaluated to ensure attainment and maintenance of the national ambient air quality standards (NAAQS) even if only a minor source permit were required by the provisions of 40 CFR Section 51.160.

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as a whole. 54 Fed. Reg. at 48875, 48887. It should be noted that EPA cites both the 1983 Reich letter and a preliminary determination in the same matter (Edward E. Reich to Allyn Davis, Director, Air and Hazardous Materials Division, EPA Region VI, June 8, 1980) for this proposition. As discussed, EPA also took the position in applicability decision that the primary activity test not only governs whether fugitive emissions are to be included but also must be used to determine what is the appropriate threshold. As noted above, this aspect of these two letters are superseded by the 1989 preamble language discussed above.

Footnote 5. The EPA's policy on this issue has also been reiterated in its NSR policy manual. See New Source Review Manual, p. A.23 (October 1990 Draft).

Because of these reasons and based upon the information currently available, it is EPA's position that the PSD threshold for Reserve's coal preparation facility is 100 tons per year. If you would like to discuss this matter further please contact Mr. Bernard Turlinski, Chief, Air Enforcement Branch at (215) 597-3989.

Sincerely,

Edwin B. Erickson,
Regional Administrator

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